IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Pritam Singh & Anr. Versus State of Rajasthan.

S.B. Criminal Misc. Petition No. 439/2005
against the order dated 17-5-2000 passed
by the Additional Chief Judicial Magistrate,
Sri Karanpur, district Sri Ganganagar, in
Criminal Misc. Case No. 53/2000.

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Date of Order: August 23, 2006

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr. Ramandeep Sidhu, for the petitioners.
Mr. Ashok Upadhyaya, Public Prosecutor for the State.

BY THE COURT:

By the instant criminal miscellaneous petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code" hereinafter), the petitioners have challenged the order dated 17-5-2000 passed by the Additional Chief Judicial Magistrate, Sri Karanpur, district Sri Ganganagar (for short, "the trial Court" hereinafter) in Criminal Misc. Case No. 53/2000, whereby the trial Court passed an order for attachment of the movable and immovable properties of the petitioners.

The facts of the case, relevant and necessary for the decision of this criminal miscellaneous petition, are that an FIR No. 77/1985 was lodged by complainant Makhan Singh against

the petitioners and co-accused for the offences under Sections 147 and 436 IPC. After investigation, the police filed final report; however, the trial Court did not accept the final report and while discharging other co-accused, took cognizance of the offence under Section 436/34 IPC against the present petitioners and issued process. However, service could not be effected on petitioner No.2 Sher Singh as he had gone as an attendant with his old father Jawand Singh to various places of pilgrims. The learned trial Court issued fresh warrants against Jawand Singh and petitioner No.2 Sher Singh and the case was adjourned to 17-5-2000. The S.H.O. Concerned made a report that Jawand Singh and petitioner No.2 Sher Singh have not returned form the pilgrims. The learned trial Court, by the impugned order, ordered to attach the movable and immovable property of Jawand Singh and petitioner Sher Singh and further directed to the Tehsildar (Revenue), Sri Karanpur to auction the agricultural land of the petitioners vide order dated 11-3-2005. The application filed by the petitioners for recalling the orders dated 17-5-2000 and 11-3-2005 was dismissed by the trial Court vide order dated 20-4-2005.

I have heard learned counsel for the petitioners and the Public Prosecutor for the State. Perused the order impugned and the record of the trial Court.

Section 82 Cr.P.C. reads as under:-

> "82. Proclamation for person absconding. If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

The proclamation shall be published as follows:

> (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides.
>
> (b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;
>
> (c) a copy thereof shall be affixed to some conspicuous part of the Court-house.

> the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.
>
> A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in Clause (i) of sub-section (2) shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

In Devendra Singh Negi alias Debu Vs. State of U.P. & Anr., 1994 Cr.L.J. 1783, the Allahabad High Court has stated that person not immediately available cannot be characterised as absconder and the court must record satisfaction on that the accused was absconding or concealing to avoid execution of warrant. The Court held as under:-

> " The words has absconded or is concealing himself so that such warrant cannot be executed in Section 82 of the Code are significant. Every person whom is not immediately available cannot be characterised as an absconder. The Court has to record its satisfaction that the accused has absconded or is concealing in order to avoid execution of the warrant. The provisions of Section 82 are mandatory and are to be construed strictly. Section 82 requires that the court must, in the first instance, issue a warrant and it must put down its reasons for believing that the accused is absconding or concealing himself."

The Court further observed that in every case where the warrant is not executed, resort cannot be had to Section 82 and it may be necessary to examine the officer concerned who had gone to execute the warrant and to the measures adopted by him to serve the same.

In Siddangouda Vs. State of Mysore, 1972 Cr.L.J. 289, the Mysore High Court observed that where a proclamation issued under Section 87 (1) (corresponding to Section 82 of the amended Cr.P.C.) requires an absconding person to appear before a Magistrate within less than thirty days from the date of

proclamation, the proclamation is in violation of Section 87 (1) and if the proclamation itself is illegal, the subsequent order for attachment of property issued under Section 88 on ground that the absconding person has failed to appear within specified time also becomes illegal.

In Dip Narain Singh & ors. Vs. The State of Bihar, 1981 Cr.L.J. 1672, the Patna High Court observed that proclamation under Sections 82 or 83 Cr.P.C. can only be issued if the court has reason to believe that the person against whom a warrant has been issued is absconding or is concealing himself to avoid execution of the warrant.

In Sushil Kumar Choudhary Vs. The State, AIR 1980 Patna 160, the Patna High Court observed that where the Magistrate directed the issue of a non-bailable warrant of arrest against the accused and also directed the bailors to be called upon to show cause why the bail bonds should not be forfeited, it was not necessary for him to issue processes under Sections 87 and 88 on the same date. He should have waited until the execution report of the warrant of arrest was received. The Court further held as under:-

> "Although the accused did act in a manner which was calculated to irritate the Magistrate, there might now be a reasonable apprehension in his mind that, owing to the annoyance and irritation caused to the Magistrate, he might not get justice."

In Pawan Kumar Gupta Vs. The State of West Bengal, 1973 Cr.L.J. 1368, the Calcutta High Court observed that simultaneous issue of a warrant of arrest and a proclamation under Section 87 (1) is illegal and improper vitiating the consequential order of attachment and the ancillary orders passed. While placing reliance on Quebec Railway Light, Head & Power Co. Ltd. Vs. Vandry, AIR 1920 PC 181, the Calcutta High Court further observed that the factum of a valid publication of the proclamation would depend on the conformance to each of the three clauses of Section 87 (2). A non-conformance of any one of them would not be a mere irregularity but would vitiate ultimately the order. The principles of interpretation of Statute rule out any redundancy in the three clauses. The Court The Court further observed that Section 87 (3) does not rule out the requirements of the Evidence Act and does not in any event override the provisions of Sections 62, 64 and 65 thereof. The presumption in Section 87 (3) only arises when the requirements of the section have not been complied with. Thus, a statement in the order that the writs of proclamation and attachment have been duly executed cannot give rise to the presumption.

The salutory provisions of proclamation under Section 82 Cr.P.C. have been enacted to protect an unaware person and to give notice to him that he is wanted in the crime to enable him to surrender to custody. Section 82 (2) lays down

rigorous conditions of the manner in which the proclamation has to be published, which includes, inter alia, affixation at some conspicuous place of the house and homestead of accused, as also at the notice-board of the court house. In every case where the warrant of arrest is not executed, resort cannot be had to Section 82 and it may be necessary to examine the officer concerned who had gone to execute the warrant and to the measures adopted by him to serve the same.

In the instant case, petitioner No. 2 Sher Singh and his father Jawand Singh had gone for pilgrims and it was brought to the notice of the trial Court. There is specific report of the S.H.O. concerned that they had not returned from the pilgrims. It is not the case that the whereabouts of the petitioner No.2 and Jawand Singh were not known. The warrants of arrest could not be executed as they had not returned from the pilgrims and, in such a factual matrix, the trial Court ought to have issued fresh warrant of arrest to procure their presence.

There is another aspect of the matter. The provisions of Section 82 Cr.P.C. are mandatory in nature. The trial court passed order for issuing standing warrant and directed the S.H.O. Concerned for making entry regarding absconding of the petitioner. However, the mandatory requirements of Section 82 Cr.P.C. have not been complied with. There is no mention in the record of the trial court that there was a written proclamation

requiring the accused-petitioner to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation. Likewise, there is no mention in the record that the proclamation was published at the conspicuous place of the town or village of the accused-petitioner or some conspicuous part of his house or homestead or a copy of the same was affixed at the conspicuous part of the court-house. There was no publication of the proclamation in a newspaper having circulation in the area where accused-petitioners reside. Again, there is no statement in writing by the court that the proclamation was duly published. Thus, there is complete non-compliance of the mandatory provisions of Section 82 Cr.P.C. and as such the impugned order cannot be sustained in the eye of law.

Consequently, the miscellaneous petition is allowed. The impugned order dated 17-5-2000 and the consequential orders dated 11-3-2005 and 20-4-2005, passed by the trial court are set-aside. The matter is remanded to the trial court for proceeding in the matter in accordance with the law. The ad-interim stay order passed by this Court on 4-5-2005 is already existing and as such the stay petition is disposed of accordingly.

(H.R. PANWAR), J.

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